Sykt Ying Mui Sdn Bhd v FRG Investments Ltd & Ors and other suits

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS 22NCVC-1491–12 OF 2012, 22NCVC-781–06 OF 2012, 22NCVC-783–06 OF 2012, 22NCVC-775–06 OF 2012 AND 22NCVC-740–11 OF 2016

AZIZUL AZMI ADNAN J

21 MARCH 2017

Civil Procedure — Pleadings — Amendment — Plaintiff sought to amend pleadings to include allegations of fraud — Whether statement of claim disclosed cause of action based on fraud — Whether fraud had already been pleaded — Whether plaintiff had provided cogent reason for delay in making application for amendment

Syarikat Ying Mui Sdn Bhd ('Ying Mui'), the plaintiff in Suit No 1491 and Suit No 740 had applied to amend its pleadings in both actions. The amendments in Suit No 740 sought to include the words 'secara menipu' *passim* in the statement of claim in order to make it clear that there was an allegation of fraud against one Hong Kiang Po. The amendment to the statement of claim in Suit No 1491 also sought to specifically include the words 'secara menipu' or 'secara penipuan' in various paragraphs of the statement of claim.

Held, allowing the application for amendment in Suit No 740 and dismissing the application for amendment to the statement of claim in Suit No 1491 with costs:

(1) The particulars contained in the statement of claim of Suit No 740 had sufficiently disclosed causes of action based on fraud, and hence the amendments that had been proposed, though strictly not necessary, could not be said to be objectionable (see para 5).

(2) Although the statement of claim in Suit No 1491 contended that the defendants were in breach of trust, the particulars specified in the statement did not contain any allegation of fraud or dishonesty or the particulars of any such fraud or dishonesty on the part of the defendants. As such, it could not be said that fraud had already been pleaded and that the proposed amendments was merely to attach a label to the particulars already pleaded (see paras 13(a), 18 & 25).

(3) Ying Mui had not satisfied the requirements laid down by the Federal Court in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301 for the amendment of pleadings. Specifically, it had

not provided any material or cogent reason for the delay in making the application for amendment (see paras 13(b), 26 & 31).

(4) Where an amendment was to be made to add fraud to pleadings, such amendment could not be allowed if the facts giving rise to the plea of fraud were all known earlier and where no explanation had been offered for the reasons why there had been a delay in making the application for amendment from the time the material facts became known to Ying Mui (see paras 13(c), 33 & 38).

[Bahasa Malaysia summary

Syarikat Ying Mui Sdn Bhd ('Ying Mui'), plaintif dalam Guaman No 1491 dan Guaman No 740 telah memohon untuk meminda plidingnya di dalam kedua-dua tindakan. Pindaan di dalam Guaman No 740 memohon untuk memasukkan perkataan 'secara menipu' *passim* dalam pernyataan tuntutan untuk membuatnya jelas bahawa terdapat tuduhan fraud terhadap seorang Hong Kiang Po. Pindaaan kepada pernyataan tuntutan di dalam Guaman No 1491 juga memohon untuk terutamanya memasukkan perkataan 'secara menipu' atau 'secara penipuan' dalam pelbagai perenggan pernyataan tuntutan tersebut.

Diputuskan, membenarkan permohonan dalam Guaman No 740 dan menolak permohonan untuk pindaan kepada pernyataan tuntutan dalam Guaman No 1491 dengan kos:

(1) Butir-butir yang terdapat di dalam pernyataan tuntutan Guaman No 740 telah secara memadai mendedahkan kausa tindakan berdasarkan ke atas fraud, dan maka pindaaan yang telah dicadangkan, walaupun secara ketat tidak perlu, tidak boleh dikatakan tidak menyenangkan (lihat perenggan 5).

(2) Walaupun pernyataan tuntutan dalam Guaman No 1491 berhujah bahawa defendan-defendan pecah amanah, butir-butir yang dinyatakan di dalam pernyatan tidak mengandungi apa-apa tuduhan fraud atau tidak jujur atau butir-butir mengenai apa-apa fraud atau ketidak jujuran sedemikian oleh pihak defendan-defendan. Dengan itu, ia tidak dapat dikatakan bahawa fraud telah diplidkan dan bahawa pindaan yang dicadangkan hanya untuk menambahkan label kepada butir-butir yang telah diplidkan (lihat perenggan 13(a), 18 & 25).

(3) Ying Mui tidak memenuhi kehendak yang ditetapkan oleh Mahkamah Persekutuan dalam kes *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301 bagi pindaan terhadap pliding. Terutamanya, ia tidak memberikan apa-apa material atau alasan paling jelas untuk kelewatan dalam membuat permohonan bagi pindaan (lihat perenggan 13(b), 26 & 31).

(4) Di mana pindaan perlu dibuat untuk menambah fraud kepada pliding, pindaan sedemikian tidak boleh dibenarkan jika fakta membangkitkan kepada pli fraud, diketahui terdahulu dan di mana tiada penjelasan telah diberikan bagi alasan mengapa terdapat kelewatan dalam membuat permohonan untuk pindaan dari masa fakta material diketahui oleh Ying Mui (lihat perenggan 13(c), 33 & 38).]

Notes

For cases on amendment, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7201–7335.

Cases referred to

Atkinson v Fitzwalter [1987] 1 WLR 201, CA (refd)
Belmont Finance Corporation Ltd v Williams Furniture Ltd and others [1979] 1 All ER 118, CA (refd)
Bentley & Co Ltd v Black (1893) 9 TLR 580, CA (refd)
Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301; [2015] 8 CLJ 1; [2016] 3 MLRA 81, FC (refd)
Ismail Bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348; [1988] 2 CLJ 632; [1988] 1 MLRH 186, HC (refd)
Jupiter Securities Sdn Bhd v Wan Yaakub bin Abd Rahman [2002] 3 MLJ 264, HC (refd)
Ketteman and others v Hansel Properties Ltd and others [1987] AC 189, HL (refd)
Leakey and Others v National Trust for Places of Historic Interest or Natural Beauty [1980] QB 485, CA (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 5 AMR 497; [2015] 7 CLJ 584; [2015] 5 MLRA 191, FC (folld)
Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan [1987] 1 MLJ 393; [1986] 1 MLRA 562, SC (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] 1 CLJ 191; [1982] 1 MLRA 417, FC (refd)

Legislation referred to

Limitation Act 1953 s 22
Rules of Court 2012 O 34 r 2(2)

Gopal Sri Ram (Ringo Low and David Yii with him) (Ringo Low & Assoc) for the plaintiff in Suit Nos 22NCVC-1491–12 of 2012 and 22NCVC-740–11 of 2016.
Gobind Singh Deo (Tee Shiau Sang & Joanne Chua with him) (Rahmat Lim & Partners) for the first, fifth and sixth defendants in Suit No 22NCVC-1491–12 of 2012.
CB Loh (YH Ong with him) (Lee Hishammuddin Allen & Gledhill) for the second, third and fourth defendant in Suit No 22NCVC-1491–12 of 2012.

Ganesh Perumal (Ganesh & Co) for the seventh defendant in Suit No No 22NCVC-1491–12 of 2012.
Gobind Singh Deo (Tee Shiau Sang & Joanne Chua with him) (Rahmat Lim & Partners) for the plaintiff in Suit Nos 22NCVC-781–06 of 2012, 22NCVC-783–06 of 2012 and 22NCVC-775–06 of 2012.
CB Loh (YH Ong with him) (Lee Hishammuddin Allen & Gledhill) for the defendant in Suit Nos 22NCVC-781–06 of 2012, 22NCVC-783–06 of 2012 and 22NCVC-775–06 of 2012.
Gobind Singh Deo (Tee Shiau Sang & Joanne Chua with him) (Rahmat Lim & Partners) for the defendant in Suit No 22NCVC-740–11 of 2016.

Azizul Azmi Adnan J:

INTRODUCTION

[1] Syarikat Ying Mui Sdn Bhd ('Ying Mui'), the plaintiff in Suit Nos 1491 and 740, applied to amend its pleadings in both actions. After hearing submissions of counsel, this court allowed the application for amendment in Suit No 740 but dismissed the application for amendment to the statement of claim in Suit No 1491. Ying Mui has now appealed against my decision on the amendment application in Suit No 1491, the reasons for which are explained below.

Background facts

[2] The cases before me involve a dispute over money that had been paid into three family owned pawnshops. These pawnshops are the second to fourth defendants in Suit No 1491.

[3] There were initially four cases before this court. These four cases had been commenced in 2012. In 2014, they were ordered to be heard together.

[4] In April 2015, Ying Mui commenced a new action against Hoh Kiang Po, who was a director in the pawnshops and who is the fifth defendant in Suit No 1491. This action was initially registered in the Commercial Division of the High Court of Malaya at Kuala Lumpur. On 10 November 2016, this case was ordered to be transferred to be heard together with the other four 2012 cases, and was re-registered as Suit No 740 in the civil division.

[5] As mentioned earlier, Ying Mui had applied to amend its pleadings in Suit No 740. The amendments sought to include the words 'secara menipu' *passim* in the statement of claim in order to make it clear that there is an allegation of fraud against Hoh Kiang Po. This court allowed the application on the basis that the particulars contained in the statement of claim had

sufficiently disclosed causes of action based on fraud, and hence the amendments that had been proposed, though strictly not necessary, could not be said to be objectionable.

[6] The parties have not appealed against this decision.

[7] Ying Mui also applied to re-amend its pleadings in Suit No 1491. It will be recalled that this suit had been commenced in 2012. In December 2014, Ying Mui had applied to amend its statement of claim to add the fifth to seventh defendants, which this court allowed on 16 March 2015. The application for joinder by Ying Mui had come about because it discovered, through the exchange of documents in another related suit, the minutes of a meeting in 2004. Ying Mui was of the view that these minutes established the liability and culpability of the fifth to seventh defendants.

[8] The application for the second amendment to the statement of claim in Suit No 1491 also sought to specifically include the words 'secara menipu' or 'secara penipuan' in various paragraphs of the statement of claim. This amendment is significant because it may have an effect on the issue of limitation. In order to fully appreciate the context of the application, I will explain briefly the circumstances prior to the application for amendment.

[9] The dispute between Ying Mui and FRG Investments Ltd ('FRG'), the first defendant in Suit No 1491, centres around the entitlement to money that had been loaned to the family-owned pawnshops. One faction of the family, represented by Ying Mui, claims that they are entitled to the money. Another faction, represented by FRG also makes the same claim. Both Ying Mui and FRG have shares in the three pawnshops.

[10] Ying Mui claims that certain money (to which it claims to be beneficially entitled) had been transferred in the books of the pawnshops to the account of FRG in breach of the fiduciary duties owed by the fifth to seventh defendants to Ying Mui, and seeks to make all the defendants in Suit No 1491 liable as constructive trustees for this money. By way of the proposed amendments in encl 253, Ying Mui now sought to establish that there had been a *fraudulent* breach of trust on the part of the defendants.

[11] The application in encl 253 was filed on 29 October 2016. Before this date, a number of case management conferences were held in order to prepare the cases for trial, at which conferences the court and the parties spent considerable time defining the issues to be tried, pursuant to and in accordance with O 34 r 2(2) of the Rules of Court 2012. At these pre-trial case management conferences, one of the issues that had been articulated was the issue of whether the defendants were entitled to the defence of limitation.

Under s 22 of the Limitation Act 1953 the general period of limitation for the recovery of trust property is six years, unless the beneficiary in question establishes fraud on the part of the trustee or in circumstances where the beneficiary is seeking to recover from the trustee trust property, the proceeds of trust property or assets converted from trust property. In such cases, there is no period of limitation. The statement of issues to be tried was finalised on 28 September 2016.

[12] It has also to be appreciated that, at the time Suit No 1491 was filed, a plaintiff must prove the existence of fraud beyond reasonable doubt. Following the seminal decision of the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 5 AMR 497; [2015] 7 CLJ 584; [2015] 5 MLRA 191, the standard of proof in civil cases for fraud was determined to be on a balance of probabilities. The contextual significance of this point is addressed at para 31, post.

DECISION BY THE COURT

[13] On 9 January 2017, I dismissed Ying Mui's application in encl 253 for amendment of its statement of claim in Suit No 1491. I was of the view that:

(a) although the statement of claim in Suit No 1491 contended that the defendants were in breach of trust, the particulars specified in the statement did not contain any allegation of fraud or dishonesty or the particulars of any such fraud or dishonesty on the part of the defendants. As such, it could not be said that fraud had already been pleaded and that the proposed amendments was merely to attach a label to the particulars already pleaded;

(b) Ying Mui had not satisfied the requirements laid down by the Federal Court in*Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1; [2016] 3 MLRA 81 for the amendment of pleadings. Specifically, it had not provided any material or cogent reason for the delay in making the application for amendment; and

(c) where an amendment is to be made to add fraud to pleadings, such amendment cannot be allowed if the facts giving rise to the plea of fraud were all known earlier and where no explanation has been offered for the reasons why there had been a delay in making the application for amendment from the time the material facts became known to Ying Mui.

[14] These reasons are explained in greater detail in the following paragraphs.

Fraud not already pleaded

[15] The first reason for rejecting the application was that I was of the view that the statement of claim did not already contain any allegation of fraud or the particulars of fraud.

[16] It is trite law that there is no particular form of words that must be used in pleadings in order to sustain a particular cause of action. Thus, even if the words 'fraud' or 'fraudulent breach of trust' have not been used in the plaint, the court will consider the cause of action as having been sufficiently pleaded if the particulars of fraud can be ascertained from the pleadings as a whole.

[17] Even though the general rule is that a party must be bound by his pleadings, where the cause of action was not specifically pleaded but it was clear that the facts in the statement of claim sufficiently established the claim, the cause of action would nonetheless be sustainable (*Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393; [1986] 1 MLRA 562). The key guiding principle is whether the defendant was afforded sufficient opportunity to answer the case of the plaintiff, and to direct his evidence to the issues disclosed in the plaintiff's statement of claim. The formula used in the English Court of Appeal case of *Leakey and Others v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 is whether there was conceivable prejudice to the defendant by the fact that the specific cause of action had not been set out in the statement of claim.

[18] Having reviewed the statement of claim in its entirety, I was of the view that the contents of the statement of claim do not support the contention that fraud had already been effectively pleaded. From the particulars pleaded, it is clear that the plaintiffs had claimed that there had been a breach of fiduciary duty owed by the fifth to seventh defendants to Ying Mui. However, it does not necessarily follow that there has to be a fraudulent act in order for there to be a breach of fiduciary duty. From the particulars of the statement of claim, Ying Mui's claim centred around the contention that the fifth to seventh defendants were fiduciaries of Ying Mui (see para 29 of the statement of claim) and had acted in breach of their duty not to act in conflict with the interests of Ying Mui by transferring or permitting the book entry transfers of money from the accounts of Ying Mui held at the pawnshops. In my view, absent the proposed amendment, there is no suggestion in the statement of claim that these transfers had been done either fraudulently or dishonestly.

[19] The critical difference between the statement of claim in Suit No 1491 against that of Suit No 740 lay in the fact that in the latter case, there were allegations that the defendant, Hoh Kiang Po, had made improper profits and had unfairly and unlawfully enriched himself (see paras 10–11 of the statement

of claim in Suit No 740). This, in my view, was sufficient to constitute dishonesty and to support a cause of action for fraud and fraudulent breach of trust.

[20] By contrast, the contentions or claims in Suit No 1491 do not go quite so far as those contained in Suit No 740.

[21] In the case of *Belmont Finance Corporation Ltd v Williams Furniture Ltd and others* [1979] 1 All ER 118, the English Court of Appeal considered whether the pleadings had sufficiently made out a claim for constructive trusteeship even though no mention had been made in the statement of claim for that relief. The preparations for trial and the first few days of the trial had proceeded on the basis that the sole claim lay in conspiracy. The plaintiff in that case argued that it was entitled to claim the existence of a constructive trust, as the facts to support the existence of such trust had been sufficiently pleaded. Buckley LJ was of the view that in order to avail itself of the remedy of a constructive trust, the plaintiff must show a dishonest or fraudulent design on the part of the putative trustee. As to whether the question of whether fraud or dishonesty had been sufficiently pleaded, Buckley LJ formulated the following principles of general application:

> An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must necessarily be used: see *Davy v Garratt* (1878) 7 Ch D 473 at p 489), which I have already mentioned, per Thesiger LJ. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent on the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.

[22] On the facts, the Court of Appeal in that case held that the statement of claim had not sufficiently pleaded dishonesty.

[23] The first observation that may be made is that, since the case of *Belmont Finance* was decided, the law of equity has evolved such that it is now no longer necessary in all cases for fraudulent or dishonest design to be proven in order for a plaintiff to succeed in making a defendant liable as constructive trustee. Thus, for example, in a claim for knowing receipt, the recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt. This state of mind is a lower level of culpability than dishonesty. By contrast, in a claim for dishonest assistance, the essential ingredient is dishonesty or conscious impropriety. In both cases, the remedy of constructive trust would be available to the successful plaintiff.

[24] Nonetheless, the principles set out in the quoted passage above would still be of general application. In the present case, the facts upon which the claim is based are complex and would be complicated to prove. The particulars pleaded are also equivocal, in that they could support a claim for mere breach of trust. It would therefore have been incumbent upon Ying Mui to have clearly spelt out fraud or dishonesty.

[25] After reviewing the statement of claim in detail and in its entirety, I came to the view that the contents of the statement of claim do not support the contention that fraud had already been effectively pleaded. It could not therefore be said that the proposed amendments was merely to attach a label to the particulars already pleaded.

The requirements of Hong Leong Finance Bhd v Low Thiam Hoe not satisfied

[26] Secondly, I was of the view that the requirements laid down by the Federal Court in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1; [2016] 3 MLRA 81 for the amendment of pleadings have not been satisfied by Ying Mui.

[27] In *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] 1 CLJ 191; [1982] 1 MLRA 417, the Federal Court held that the general principle for the amendment of pleadings is that the court will allow such amendments as will cause no injustice to the other parties. There were three basic questions that should be considered to determine whether injustice would or would not result:

(a) whether the application was bona fide;

(b) whether the prejudice caused to the other side can be compensated by costs; and

(c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[28] However, with the advent of active judicial management of cases, it is now established that these are not the only considerations that will be taken into account by a court in exercising its discretion whether or not to allow an amendment to pleadings. In *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1; [2016] 3 MLRA 81, the Federal Court was of the view that an applicant must also provide material and cogent reasons to explain the delay in making the application for amendment where such application is made at a late stage in the proceedings.

[29] In the present instance, the material information that came to the knowledge of Ying Mui were the minutes of the 2004 meeting (discussed at

para 7 ante). These minutes were discovered on 1 August 2014, and as a consequence of their discovery, an application to amend the statement of claim was made on 15 December 2014, which application this court approved in March 2015. Ying Mui did not rely on any additional material or information in making the application for re-amendment of the statement of claim to include the contention of fraud. In other words, all the materials on which it sought to rely upon to support its allegation of fraud had been available to it more than two years prior to making the application to include fraudulent breach of trust as a cause of action. Ying Mui ought to have made the application to include fraud or fraudulent breach of trust at the same time it had earlier applied to join the fifth to seventh defendants as parties to Suit No 1491. Instead, the reamendment application was made only on 29 October 2016, more than a year and half after the court allowed the first application for amendment of the statement of claim.

[30] No reasons have been provided to explain this delay.

[31] Accordingly, even though I was of the view that the requirements laid down in *Yamaha Motors* had been satisfied, but because there has not been any material or cogent reasons supplied to account for the delay for making the application for re-amendment, I was constrained to dismiss the application.

[32] It is perhaps understandable that, prior to the decision in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd*, a plaintiff would hesitate to raise an allegation of fraud, given the high evidentiary burden placed on the plaintiff to prove his case beyond reasonable doubt. Nonetheless, it would be open to a plaintiff to plead in the alternative, and to maintain actions both for breach of trust and for fraudulent breach of trust. This the plaintiff in Suit No 1491 had not done. It was only in the course of pre-trial case management conferences that it became apparent to counsel for Ying Mui that it may be precluded from succeeding in its claim by limitation unless it could establish fraud. In this connection, it would be apposite to heed the words of Griffiths LJ in the House of Lords decision in *Ketteman and others v Hansel Properties Ltd and others* [1987] AC 189:

> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

An application to add an allegation of fraud must be made at the earliest opportunity

[33] Thirdly and finally, there is authority for the proposition that where an amendment is to be made to add fraud to pleadings, such amendment cannot be allowed if the facts giving rise to the plea of fraud were all known earlier or where the delay was in connection with some tactical manoeuvre. In *Ismail Bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348; [1988] 2 CLJ 632; [1988] 1 MLRH 186, the plaintiffs had sold a piece of land to the first defendant, who had then charged the land to the second defendant. The plaintiffs' original statement of claim did not appear to cite a specific cause of action, but sought a declaration that the initial sale was null and void, and sought to discharge the second defendant's charge. Almost 11 months later, the plaintiffs sought to amend their pleadings to raise a claim of fraud against the second defendant. Mohamed Dzaiddin J (as His Lordship then was) found that there had been considerable delay on the part of the plaintiffs and that the facts that gave rise to the plea of fraud had been known to the plaintiffs or their solicitors much earlier. In dismissing the application for amendment, His Lordship held:

> [I]t is as clear as day to me that both *Yamaha* and *Atkinson* have crystalised the principle governing amendments of pleadings which was first enunciated in 1883 in *Clarapede*. They are however not without exceptions. In the case of adding fraud, according to Stocker LJ in *Atkinson* they cannot be allowed if the facts giving rise to the plea of fraud were all known earlier or where the delay was in connection with some tactical manoeuvre. In the present case, Mr Chan has succeeded in persuading me to accept the exceptions identified by Stocker LJ as being relevant.

[34] The decision in *Ismail Bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* was followed by the High Court in *Jupiter Securities Sdn Bhd v Wan Yaakub bin Abd Rahman* [2002] 3 MLJ 264.

[35] A close examination of the decision of the Court of Appeal in *Atkinson v Fitzwalter* [1987] 1 WLR 201 (which was cited in *Ismail Bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor*) will reveal the English Court of Appeal in that case found that, as a matter of general principle, a party to litigation should be permitted to amend his pleadings at any stage in the proceedings in order that all matters in controversy between the parties should be before the court, and that there was in fact no rule of general application that allegations of fraud had to be pleaded at the outset and could not be added by way of amendment. The dictum of Escher MR in *Bentley & Co Ltd v Black* (1893) 9 TLR 580 was not followed, on the basis that in that case, there had not been any application for amendment in the first place.

[36] In *Bentley & Co Ltd v Black,* the plaintiff company sued the defendant

for the latter's failure to fulfil a capital call. The court at first instance found for the plaintiff, following which the defendant applied for a new trial. The defendant sought to argue before the Court of Appeal that he had been induced to subscribe for the shares by fraudulent misrepresentation. In relation to this defence, Escher MR stated:

> Two objections were taken to that defence. In the first place, it was pointed out that fraud had not been pleaded, neither had any amendment been made for the purpose of setting up a plea of fraud. It had for a long time been the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud had not been pleaded in the first instance. It was therefore clear that this defence could not now be relied on. The second objection to the defence was that there was no evidence of any fraudulent misrepresentation having been made.

[37] As mentioned earlier, the Court of Appeal in *Atkinson v Fitzwalter* declined to follow *Bentley & Co Ltd v Black* and held that there was no rule of general application that allegations of fraud had to be pleaded at the outset and could not be added by way of amendment. Accordingly, it would appear that the dicta of Stocker LJ (reproduced below) that was relied upon by the High Court in *Ismail Bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* ought to be confined to the particular circumstances of that case, which involved an application by a defendant in a defamation action to amend its pleadings to add a plea of justification, and where such plea of justification included an allegation of fraud against the plaintiff. Stocker LJ had stated in *Atkinson v Fitzwalter*:

> I should add that, in my opinion, a plea of justification should not be allowed by amendment in circumstances in which the statement alleged to be defamatory unequivocally involves an assertion that a plaintiff has been fraudulent. In such circumstances it behoves a defendant to be in possession of all the relevant facts in support of the contention before he makes the defamatory statement and he cannot be allowed to amend on the basis that his statement was unsupported by evidence known to him at that time.

[38] In my judgment, these cases must be understood and evaluated in the light of the modern approach adopted by the courts in dealing with amendments to pleadings. Even though there is no rule of general application that amendments to pleadings to include an allegation of fraud must be made at the outset, an applicant should nonetheless seek leave as soon as the facts supporting the contention of fraud had come into its knowledge. If it fails to do so, then it must satisfy the court that there are material and cogent reasons to explain the delay. Even though the aim of litigation is to put the real matter in dispute before the courts in order that justice be served, against this must be weighed the prejudice that may be occasioned the other parties where there has been unexplained delay on the part of one party and the fact that court

resources are finite, bearing in mind also that it is a duty of a judge to secure the just, expeditious and economical disposal of cases.

The contentions of counsel for Ying Mui

[39] The foregoing are sufficient to have disposed of the application by Ying Mui. In the following paragraphs, I address certain arguments put forward by learned counsel for Ying Mui, to the extent that they have not been specifically addressed earlier.

[40] It was advanced for Ying Mui that the amendments were necessary as a consequence of the decision of the Court of Appeal in the striking out appeal in Suit No 740. It will be recalled that Suit No 740 was originally registered before the Commercial Division of the High Court, as Suit No 22NCC-81–04 of 2015. This suit was struck out by the High Court, but was reinstated on appeal. Before me, Ying Mui averred that:

(a) the proposed amendments was based on the order of the Court of Appeal of 11 October 2016, which allowed FRG's appeal against the striking out; and

(b) the Court of Appeal had directed Ying Mui to file an application to amend its statement of claim within 14 days of its decision.

[41] Learned counsel for Ying Mui further maintained that the amendments sought to merely put labels to the conduct complained of, and that the amendments were simply in furtherance of an undertaking that he had given to the Court of Appeal and repeated before me that the statement of claim would be amended to overcome the objection taken by the defendant Ho Kiang Po at the High Court.

[42] I disagreed with the contentions of counsel for Ying Mui, for the following reasons:

(a) there is nothing in the sealed order of the Court of Appeal in that case that directed the amendments to be effected to the statement of claim in Suit No 740, let alone the statement of claim in Suit No 1491; and

(b) in any event, the acts complained of in Suit No 740 are separate from those in Suit 1491.

[43] For these reasons, I dismiss the application by Ying Mui in Suit No 1491 with costs.

Application for amendment in Suit No 740 allowed; application for amendment to statement of claim in Suit No 1491 dismissed with costs.

Reported by Dzulqarnain Ab Fatar